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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LEONARD ISACC CLARK, Defendant and Appellant.	B284937 (Los Angeles County Super. Ct. Nos. GA099662, SA091839)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Villalobos, Judge. Affirmed and remanded with directions.

Lori Nakaoka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Shawn McGahey Webb, and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Leonard Isacc Clark (defendant) appeals from the judgment entered after he was convicted of burglary and attempted burglary. He contends that the trial court erred in denying his motion for acquittal, in allowing a postverdict amendment to the information, and in failing to take a new jury trial waiver after the amendment. Defendant also contends that any finding of forfeiture of the issue was due to ineffective assistance of counsel, that the trial court abused its discretion in running the terms imposed in superior court case No. SA091839 consecutively to the terms imposed in the current case, and that his sentence was cruel or unusual in violation of the Eighth Amendment to the United States Constitution. Defendant also seeks remand to give the trial court the opportunity to exercise discretion recently granted under Senate Bill No. 1393. We remand to give the trial court the opportunity to exercise recently granted discretion, but find no merit to defendant's remaining contentions, and thus affirm the judgment.

BACKGROUND

In a four-count information filed in the current case, defendant and codefendant Taylor Ward were charged as follows: count 1, first degree burglary of an occupied dwelling in violation of Penal Code section 459;[1] and counts 2 and 3, attempted first degree burglary of an occupied dwelling in violation of sections 664 and 459. As to all counts, the information alleged that defendant had suffered three prior felony convictions for which he had served prison terms within the meaning of section 667.5, subdivision (b), and three prior serious felonies within the meaning of section 667, subdivision (a)(1). In addition, the

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[1] All further statutory references are to the Penal Code unless otherwise stated.

information alleged that defendant had suffered three serious or violent felony convictions (all first degree burglaries) within the meaning of section 667, subdivisions (b) through (j), and section 1170.12 (the Three Strikes law).

Defendant was also charged with a probation violation in case No. SA091839, based in part on his arrest in the current case, which was simultaneously presented to the court.

A jury found defendant guilty as charged, and found true the allegation that the burglary and attempted burglaries were residential. The court found defendant in violation of probation in case No. SA091839. After the verdicts were entered, defendant waived his right to jury trial on the bifurcated prior conviction allegations.

At the court trial on the prior convictions before sentencing, the prosecutor moved to correct a typographical error in the information, which alleged that the three prior strike convictions were committed "prior to the commission of the offense or offenses alleged in Counts 3." The trial court granted the request, and the information was amended by interlineation to refer to counts 1 through 3. Defendant then waived his right to a trial on the prior conviction allegations, and admitted them.

On July 6, 2017, the trial court struck the three prison priors and two of the strike priors as to counts 2 and 3. The court sentenced defendant to a total prison term of 45 years to life, comprised of the following: as to count 1, life in prison with a minimum term of 25 years as a third strike, plus five years for each of three prior serious felony convictions pursuant to section 667, subdivision (a); as to each of counts 2 and 3, one third the middle term of two years or 8 months, doubled to 16 months as a second strike, to run consecutively to the term imposed in count 1. In case No. SA091839, the court imposed 16 months (one-third the middle term of four years), doubled to 32 months, to run

consecutively to counts 1, 2, and 3. Defendant was given custody credits and ordered to pay mandatory fines and fees, as well as direct victim restitution to be determined.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Both Alhambra Police Officer Henry Reyes and Detective Jack Ng, testified about their extensive experience investigating residential burglaries, describing a common type of residential burglary known as "flocking." Typically in such a case, two or three perpetrators operate together, have a getaway car, and choose a residential area near a freeway but not near major intersections. One of the accomplices will knock on the front door of a house, usually between 9:00 a.m. and 6:00 p.m., in order to determine whether anyone is home. If not, they attempt to enter the residence through a window or back door, usually wearing gloves. If there is an answer to their knock, an excuse is given, such as looking for a particular person or to see if the car parked on the street is for sale. Operating near a freeway allows the perpetrators to enter and leave the area quickly.

Judy Huang (Huang) testified that she lived on a quiet street with little traffic, about three or four blocks from the freeway. On September 14, 2016, she left her South 8th Street house at about 8:30 a.m. to go to work. Some time that afternoon, her mother called to ask her whether she had been home, because the door was unlocked and open. Huang asked her mother to wait for her outside and called the police. When she arrived home the doors were unlocked and open, the bedrooms were a mess with piles of clothes and blankets all over the floor, drawers stood open, four back windows were broken, and a pillowcase was missing. Huang's mother testified that she left the house about 9:00 a.m., closed and locked the doors and

windows, and when she returned that afternoon, the front door was unlocked and windows at the back of the house were broken.

Later at the police station, Huang identified items belonging to her, including a Louis Vuitton purse and wallet, and a pair of shoes, with a combined value of over $2,000, as well as some items of jewelry, a jewelry box, and her mother's pink pillowcase.

Samantha Hui (Hui) lived about two miles away from Huang's residence on South Parkview Drive, Alhambra. Hui testified that on September 14, 2016, her white Honda, was parked on the street outside her home. It was not for sale and had no sign. About 11:20 that morning, she heard a series of loud knocks on her door, looked out her second-floor window, and saw a person she had never seen before, later identified as codefendant Ward. The doorbell had a camera that was activated by ringing the doorbell, and Hui's mother and stepfather had answered the door remotely. Ward was mumbling and appeared to be hiding something in her sweater. After a few moments Ward left, and Hui watched her get into a black Toyota Camry. Hui noted the license plate and called police, suspecting that Ward had been testing to see if anyone was home.

Hui's stepfather, Eric Skjarstad, testified that when his cell phone alerted him that someone had rung the front doorbell that morning, the camera was activated and he spoke through the cell phone to a person he later identified as Ward. He testified that at first it was hard to understand Ward, and after he asked her a second time what she was wanted, Ward replied that there was a sign on the Honda or Hyundai parked outside, and she was wondering if it was for sale. He told her he did not know, that the car belonged to his stepdaughter, and he could ask her. A video recording of the conversation was played for jury.

A few minutes later, Blaine Ohigashi (Ohigashi), who lived on a quiet street about two blocks from the Hui/Skjarstad residence on West Ross Avenue, heard someone banging on his door. Initially he ignored it, but the banging continued, so he looked out the window and saw someone in a red shirt. Since he did not know the person, he did not answer the door. Seconds later, he heard a police siren.

Officer Reyes was in uniform on patrol in a marked police car when he was dispatched to a familiar area on Parkview Drive, about five blocks from an onramp to the I-10 Freeway. He had been given the license number that Hui had reported, which he located on a car parked in front of Ohigashi's house on West Ross Avenue. Officer Reyes saw a man he later identified as defendant at the door of the residence, wearing a red sweater and black pants. A person he later identified as Ward was in the driver's seat of the car. A third person was in the back seat of the car, lying down as though hiding.

Officer Reyes asked defendant to sit on the curb and was heading to speak to Ward, when he saw that defendant appeared to be using his cell phone. When he heard a buzzing noise coming from near Ward, Officer Reyes told defendant to stop, and asked Ward to turn off the car and give him the keys. Ward said something about not being able to turn off the car or that she could not find the keys, when defendant stood up and began running eastbound. Ward drove toward defendant, stopped midblock to allow defendant to enter the car on the passenger side, and then she drove on. An audio/video recording of the scene taken from the camera mounted on the patrol car was played for the jury.

Officer Reyes got into his car and gave pursuit. Ward travelled about 10 to 15 miles per hour in excess of the speed limit, driving recklessly and running approximately four stop

signs. She entered the I-10 freeway traveling at least 65 on the 55-mile-per-hour ramp. By the time they reached the 710 freeway, Ward was traveling at 80 to 90 miles per hour. The I-10 freeway was crowded and traffic was moving at about 50 miles per hour. The 710 freeway was also crowded and Ward swerved from lane to lane. After four to five minutes on the 710 freeway, Ward exited at Third Street, collided with a guardrail on the ramp, and then collided with a mailbox and a parked car. The three occupants of Ward's car got out and ran. Officer Reyes pursued them on foot and managed to catch up with Ward. He detained and handcuffed her, returned her to his vehicle, but lost track of defendant and the other passenger.

Assisting police units set up a containment of the area, and detectives were able to locate defendant as he peered out of the brush next to the freeway sound wall about one-half mile from the Third Street exit. Officer Reyes made the identification, and then searched the car. He found a pillowcase on the rear floorboard, which contained a white Louis Vuitton purse, a jewelry box, several items of gold-colored jewelry, and some coins. Officer Reyes explained that it was a recent trend for burglars is to use a pillow case taken from the scene to hold their loot. He also found two cell phones and a radio scanner on the driver's side floorboard. He explained that a radio scanner picks up emergency broadcasts, including those from police dispatch, allowing the listener to know if the police are responding to a call and where they are. Later, another detective found clothing in the trunk, including four pairs of gloves.

DISCUSSION

I. Motion for acquittal

Defendant contends that the trial court erred in denying his section 1118.1 motion for acquittal.

A defendant is entitled to "a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." (§ 1118.1.) "'The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case.' [Citations.] The question 'is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination.' [Citation.] The sufficiency of the evidence is tested at the point the motion is made. [Citations.] The question is one of law, subject to independent review. [Citation.]" (*People v. Stevens* (2007) 41 Cal.4th 182, 200.) Since defendant brought his motion at the close of the prosecution's case-in-chief, we review the sufficiency of the evidence as of that time.

Defendant directs his arguments individually to each count. He argues that there was no evidence of defendant's presence during the Huang burglary, and thus no evidence that he was either a direct perpetrator or aider and abettor in count 1. Defendant makes a similar argument as to count 2, arguing that the evidence showed only Ward's presence at the Hui residence. As to count 3, defendant's position is that although he was present and seen knocking on Ohigashi's door, this was evidence of preparation, not an attempt to commit a burglary.[2]

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[2] "'[B]etween preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.' [Citations.] "'[I]t is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made.'" [Citation.]" (*People v. Superior Court (Decker)* (2007) 41 Cal.4th

"In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction." (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.) Thus, contrary to defendant's approach, a review of the denial of a section 1118.1 motion, like a review from a conviction, focuses on all the evidence presented, rather than on isolated portions. (*People v. Cuevas* (1995) 12 Cal.4th 252, 262.) Not only must the evidence be reviewed as a whole, it must be reviewed in the light most favorable to the judgment below. (*Id*. at pp. 261-262.) "'The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence . . . .' [Citation.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.) We must draw all reasonable inferences to be drawn from the evidence. (*Cole*, at pp. 1212-1213.)

At the outset we observe that the evidence showed two of the three incidents closely resembled the method known as "flocking," which typically includes two or three perpetrators with a getaway car, operating near a freeway but away from busy intersections, where one of the accomplices would knock at a residence door during working hours in order to find an unoccupied home. If no answer, the burglars would then enter through a back window or door, usually wearing gloves; if the knock was answered, the accomplice would then make some excuse for his/her presence. Consistent with the descriptions of the method given by both Detective Ng and Officer Reyes, all three incidents took place in a quiet neighborhood, not far from a freeway entrance, after 9:00 a.m. and before residents would be

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1, 8.) "'[W]henever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt.' [Citations.]" (*Ibid*.)

expected home from work. Ward was seen at the door of one residence, defendant was seen knocking at the door of another residence. Ward drove the same car on both occasions, giving rise to a reasonable inference that they were working together. When Ward's call at the Hui residence resulted in an answer, she gave one of the typical excuses: looking to see if the car parked on the street is for sale. Although there was no evidence of a knock at the unoccupied Huang residence, the windows at the back of the house were broken, and the front door was unlocked, suggesting that the burglars broke into the rear of the house and left through the front door.

Most telling was the presence of the goods taken from the Huang home found in the getaway car. "[J]urors [may] infer guilt of burglary [or] theft from the possession of stolen property plus some corroborating evidence . . . . [Citations.]" (*People v. Grimes* (2016) 1 Cal.5th 698, 730.) Indeed, "'[p]ossession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt.' [Citation.]" (*Id.* at p. 731, quoting *People v. McFarland* (1962) 58 Cal.2d 748, 754.)

Defendant contends that this principle is not applicable here, because defendant was not shown to be in *possession* of the car or of the stolen goods. He compares the facts with *People v. Myles* (1975) 50 Cal.App.3d 423, 429, in which the evidence of possession was insufficient because it showed only that defendant had been a passenger in a car and was seen standing close to the trunk of the car in which there were stolen goods. Defendant also relies on *People v. Zyduck* (1969) 270 Cal.App.2d 334, 335-336 (*Zyduck*), in which it was held that "mere presence in a car owned and driven by another, in which the stolen property is readily visible, is [not] enough to show possession. . . . [¶] . . . Dominion

and control are essentials of possession, and they cannot be inferred from mere presence or access." (See also *People v. Martin* (1973) 9 Cal.3d 687, 696, citing *Zyduck*.)

As the *Zyduck* court went on to explain: "Something more must be shown to support inferring . . . these elements. Of course, the necessary additional circumstances may, in some fact contexts, be rather slight. [Citations.] It is clear, however, that some additional fact is essential." (*Zyduck, supra*, 270 Cal.App.2d at p. 336.) Defendant argues that there were insufficient additional circumstances here because there were two other people in the car and no evidence was introduced as to the ownership of the car. We find defendant's focus to be too narrow. "[T]here is no single factor or specific combination of factors which unerringly points to possession . . . . [T]he question of possession turns on the unique factual circumstances of each case." (*People v. Land* (1994) 30 Cal.App.4th 220, 228.) Although mere presence and access to stolen goods is insufficient, the defendant need not be in actual possession; constructive possession may be established by the defendant's dominion and control over the property with evidence of the defendant's conduct, including flight and hiding from the police, his relationship to the alleged accomplice, and any other facts suggesting complicity. (*Id.* at pp. 227-228.)

We do not agree with defendant's premise that the presence of a third person or the absence of evidence of the car's owner precludes a finding of possession. Ward was waiting in the driver's seat with the car running while defendant knocked on a stranger's door just two blocks from the house where Ward had had done the same thing 10 minutes earlier, on the same morning that the nearby Huang residence was burglarized. When interrupted by Officer Reyes, defendant fled with Ward in the apparent getaway car. It is reasonable to infer that

defendant and Ward committed the Huang burglary together and that defendant knew the items they took were in the car. The evidence thus showed more than mere presence and access.

We agree with respondent that "powerful circumstantial evidence [established] that [defendant] was not an innocent bystander in an earlier burglary committed by others, but was a willful participant in the previous crime." We also agree that defendant's flight was evidence of a consciousness of guilt and constituted an implied admission (see *People v. Williams* (2013) 56 Cal.4th 630, 679), particularly since defendant fled not once, but a second time after the collision, and then hid in bushes next to the freeway, until found by the police. We independently conclude that "'the prosecution . . . presented sufficient evidence to present the matter to the jury for its determination,'" and the motion was properly denied. (*People v. Stevens, supra*, 41 Cal.4th at p. 200.)

II. Postverdict amendment

Defendant contends that the prosecutor's postverdict amendment was untimely, and that the trial court erred in allowing the amendment. The amendment was made in open court with defense counsel at defendant's side. Defendant did not object to the amendment, and nothing was called to the court's attention to show that defendant's rights would in any way be prejudiced. A challenge to the amendment of a pleading may not be raised for the first time on appeal. (*People v. Lewis* (1983) 147 Cal.App.3d 1135, 1140.)

Moreover, defendant's contentions have no merit. As originally filed, the information did not allege that the Three Strikes law applied only to count 3, but merely that the prior convictions were committed prior to the offense alleged in count 3. After the verdicts were entered, the prosecutor claimed this was a typographical error, and the trial court granted her request

to amend the information by interlineation so that the prior strike convictions were alleged to have been committed prior to the offenses alleged in counts 1 through 3. Defendant thereafter waived his right to a trial on the prior conviction allegations, and admitted them.

Defendant now seeks reversal of the sentence and remand for a nonstrike resentencing. He construes the pleading requirement under the Three Strikes statute as expressly requiring the qualifying felony convictions be alleged *as to each count*. We see it differently. The pleading requirement is found in section 667, subdivisions (e)(1) and (e)(2)(A), as follows: "If a defendant has one prior serious or violent felony conviction . . . that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction"; and, "if a defendant has two or more prior serious or violent felony convictions . . . that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term . . . ." (See also § 1170.12, subd. (c).) Under the plain language of the statute, the only *express* pleading requirement in the Three Strikes law is that the defendant have one or more prior felony convictions which will subject him to the provisions of the statute.

In support of his construction of the Three Strikes statute, defendant compares the pleading requirement of the Three Strikes law with an entirely different statute, the "One Strike" law set forth in section 667.61.[3] Defendant relies on the

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[3] Section 667.61 "sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes" when a defendant commits one of those crimes under specified circumstances. The pleading requirements of section 667.61 are contained in subdivision (f) and former subdivision (i), now (o).

California Supreme Court's construction of section 667.61 in *Mancebo*. We agree with respondent that defendant's reliance on *Mancebo* is misplaced. In *Mancebo*, "the narrow question presented" was whether the fact of gun use, which had already been properly pled and proved as a basis for invoking One Strike sentencing, could be used instead as a sentence enhancement under section 12022.5, subdivision (a), while substituting the proven but not pled fact of multiple victims to invoke One Strike sentencing, all without prior notice. (*Mancebo, supra*, at pp. 738-739, 749; see § 667.61, subd. (e)(3) & (4).) There is no comparable enumeration of factual circumstances in the Three Strikes law, and neither *Mancebo* nor section 667.61 is applicable here, whether directly or by analogy.

Defendant's reliance on *People v. Nguyen* (2017) 18 Cal.App.5th 260, is also misplaced. In that case, the information alleged a prior conviction as a strike prior, referring to section 667, subdivisions (b) through (i), as well as a prior prison term enhancement, referring to section 667.5, subdivision (b). "However, it never specifically alleged -- either in so many words or by citing the relevant statute -- a prior serious felony conviction enhancement" under section 667, subdivision (a). (*Nguyen*, at pp. 262-264.) The court held that the prior conviction could thus not be used to impose a five-year enhancement under section 667, subdivision (a). (*Nguyen*, at p. 264.) The case thus turned on the failure to alleged a five-year enhancement, not a failure to repeat such an allegation in reference to each count. Here, the information did not fail to allege, either in words or by

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(*Mancebo* (2002) 27 Cal.4th 735, 741 (*Mancebo*); see Stats. 1998, ch. 936, § 9.) Section 667.61, subdivisions (d), (e), and (n) set forth a total of 20 factual circumstances under which a shorter or longer sentence would apply.

referring to the statute, that defendant had suffered a prior strike. The facts are not analogous.

Mancebo and *Nguyen* are applicable here only for the general principle that a defendant has a due process right to fair notice of the factual allegations that will be invoked to impose a sentence enhancement or otherwise increase the punishment for the charged crimes. (See *Mancebo, supra*, 27 Cal.4th at p. 747.) Defendant has failed to demonstrate that he did not receive fair notice that the statute applied to all the counts alleged in the information.

Moreover, although there is no requirement in the statute that the strike allegation be attached to each qualifying count, the information did, in fact, set forth *as to each count* the possible enhancements, and cited sections 667, subdivision (b)-(j), and 1170.12. This is found in the information summary of charges on pages two and three of the information, which lists "PC 1170.12" in the "Allegation" column for counts 1, 2, and 3. The factual pleading of the charges begins on the next page, and the factual and additional statutory pleading of the three prior strike convictions appears on page seven of the information, which lists the prior serious or violent felonies as qualifying under sections 667, subdivision (b)-(j), and 1170.12. Under such circumstances, the information was at most ambiguous due to the variance between the information summary and the factual and statutory pleading of the prior strike convictions which referred only to count 3. As such, it appears to be a clerical error, creating an uncertainty which made the information subject to demurrer. (See §§ 952, 1004, subd. 1.) "The well-established rule is that failure to demur on the ground that a charging allegation is not sufficiently definite waives any objection to the sufficiency of the information. [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 672.)

Furthermore, the amendment was not untimely. "[T]he Penal Code permits accusatory pleadings to be amended at any stage of the proceedings 'for any defect or insufficiency' (§ 1009), and bars reversal of a criminal judgment 'by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits' (§ 960)." (*People v. Whitmer* (2014) 230 Cal.App.4th 906, 919-920.) Defendant's failure to object may be regarded as an implied consent to the amendment. (*Id.* at p. 920.) Defendant's reliance on *People v. Valladoli* (1996) 13 Cal.4th 590 and *People v Tindall* (2000) 24 Cal.4th 767 is misplaced, as those cases have no similarity or application to the circumstances presented here. The issue in those cases involved postverdict amendments to *add enhancements* after the jury had been discharged, which the California Supreme Court held to be prohibited under section 1025, subdivision (b).[4] No enhancement was added here. As we have discussed, the information merely alleged that the strike convictions occurred prior to the commission of the offense in count 3. As count 3 was committed on the same day as counts 1 and 2, nothing was added by the amendment. In any event, the information summary referred to all three counts as subject to punishment under the Three Strikes law.

It is clear that defendant received adequate notice of the scope of the enhancement. Defendant was represented by counsel at arraignment and throughout the proceedings, including postverdict proceedings. At the court trial on the prior

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[4] Section 1025, subdivision (b), reads in relevant part: "[T]he question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or in the case of a plea of guilty or nolo contendere, by a jury impaneled for that purpose, or by the court if a jury is waived."

convictions, the trial court granted the prosecution's motion to amend the information before defendant waived trial on the prior convictions. The trial court advised defendant of his trial rights, including proof beyond a reasonable doubt, as well as the rights of confrontation, to remain silent, and to present a defense to the allegations. Defendant then waived those rights, and the trial court advised him as follows:

> "You should also be aware by admitting the three prior serious felony convictions, you will be falling within the Three Strike law, which means that you could be sentenced to a term under the Three Strikes law *for each count*. It would be based on the way the sentencing law is structured. It would be 25 to life plus an additional 15 years for the serious felonies. The Three Strikes law also requires consecutive sentencing. So what you're looking at is 40 to life on each charge for a total of a minimum of 120 years to life with admission of the priors. Do you understand your exposure as to the priors?" (Italics added.)

Defense counsel then requested a few minutes to confer with her client, and after an unreported discussion of unknown duration, the trial court proceeded with codefendant Ward's sentencing. After a lengthy sentencing hearing, the trial court turned back to defendant's admissions, and the following colloquy ensued:

> "The Court: [W]e were discussing the defendant's maximum exposure. As I explained, his maximum exposure that doesn't mean the sentence that the court is going to impose. It just means that the court could sentence you to the maximum which would be about 120 years to life.
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> "[Defense counsel]: Your Honor, just on that point, [the prosecutor] and I were just conferring, and we're not sure if we're both incorrect or your Honor's

calculations because we have less than that even for the maximum.

"The Court: All right. So let me just go through real quick. Under the Three Strikes law, there are options and one of the options for each conviction of a serious felony is 25 years to life right.

"[Defense counsel]: Correct.

"The Court: The Three Strikes law mandates that those sentences be consecutive. So right there you're looking at 75 to life.

"[Defense counsel]: Yes, we concur with that, your Honor.

"The Court: The Three Strikes law -- case law also has interpreted the five years prior under 667(a), when the person -- when the defendant is sentenced to an indeterminate term under the Three Strikes law, in other words the complete sentence is an indeterminate term, that means so on count 1 the defendant receives 25 years to life plus five years for each prior serious felony conviction under 667(a). He has three prior serious felonies; that's 15 years.

"[Defense counsel]: We concur.

"The Court: And unlike 1170.1 when you take the five-year priors and you just add them at the complete sentence, *under the Three Strikes law, it is under each count* for an indeterminate sentence. So on count 1, it's 40 to life. Then you add that 15 to count 2 which is 40 to life, and you add the 15 years to count 3. Which is different for a second-strike sentence because the second strike you would only add it one time if the complete sentence was a second strike.

"[Defense counsel]: Thank you, your Honor."
(Italics added.)

Thus the trial court thoroughly explained the application of third-strike sentencing as to counts 1, 2, and 3, and defendant had ample time to discuss with counsel the consequences of the amendment and his admission. Under such circumstances, and as defendant impliedly consented to the amendment, he "'cannot legitimately claim lack of notice . . . .' [Citations.]" (*People v. Toro* (1989) 47 Cal.3d 966, 973, disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) We conclude that the amendment did not result in a denial of due process.

III. Jury waiver

Defendant contends that the sentence must be vacated because he did not waive his right to a jury trial on the prior strike allegation as to counts 1 and 2. He relies on *People v. Hopkins* (1974) 39 Cal.App.3d 107 and *People v. Sanders* (1987) 191 Cal.App.3d 79, which held that a new jury trial waiver must be taken when a new offense or new enhancement is added by amendment. These authorities are inapplicable here. As discussed above, no new enhancement or charge was added here. The amendment merely clarified an ambiguity in the form of the information. Defendant impliedly consented to the amendment and admitted the prior strike convictions.

IV. Effective assistance of counsel

Defendant asks that we find ineffective assistance of counsel if the above points II and III are deemed forfeited due to defense counsel's failure to object. As we have found no merit to either point, we reject this claim as well. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 463 [failure to make meritless objections is not ineffective assistance].)

V. Consecutive sentence after probation violation

Defendant claims that the case must be remanded for resentencing because the trial court was unaware of its discretion to run the probation violation sentence in case No. SA091839 concurrently with the sentence in the current case. In case No. SA091839, defendant was convicted upon a guilty plea, sentenced to a suspended second-strike term of eight years in prison, and placed on probation. The conviction was alleged as a prior strike in the current case, and the current case was the basis of finding defendant in violation of his probation.

Citing *People v. Rosbury* (1997) 15 Cal.4th 206, defendant contends that under the circumstances presented here, the trial court had the discretion to run the sentence on the prior conviction concurrently with the sentence in the current case. *Rosbury* held that section 667, subdivision (c)(8), the provision which requires consecutive sentencing, does not apply to a prior strike conviction for which the defendant is on probation. (*Id*. at pp, 209-210.) To show that the trial court was unaware of its discretion, defendant points to the following statement made by the trial court when explaining the potential consequences of his admission of the prior convictions: "The Three Strikes law also requires consecutive sentencing."

Respondent agrees that the court was not precluded from exercising its discretion to run the sentence imposed in case No. SA091839 concurrently, but contends that defendant has forfeited the issue by failing to object to the consecutive sentencing. (*People v. Weddington* (2016) 246 Cal.App.4th 468, 491, citing *People v. Scott* (1994) 9 Cal.4th 331, 356.) Defendant counters that if the issue is forfeited by defense counsel's failure to object, he received ineffective assistance of counsel. We thus "address it 'on the merits to the extent necessary to decide the

ineffective assistance claim.' [Citation.]" (*People v. Ochoa, supra*, 19 Cal.4th at p. 431.)

To determine that the court was unaware of its discretion, we begin with the requirement of appellate review that "'[a]bsent a showing to the contrary, the trial court is presumed to have known and followed the applicable law and to have properly exercised its discretion. [Citation.]' [Citation.]" (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1264.) Defendant does not show otherwise.

Defendant has isolated a single sentence from the trial court's explanation of the potential consequences of admitting his prior strike convictions on counts 1, 2, and 3 of the current case. The court was clearly not addressing the potential sentence on the conviction in case No. SA091839. The court explained that defendant "could be sentenced to a term under the Three Strikes law for each count [and] [t]he Three Strikes law also requires consecutive sentencing." The court concluded: "So what you're looking at is 40 to life on each charge for a total of a minimum of 120 years to life with admission of the priors." As 40 years times three is 120 years, it is clear that the court was speaking only of the three current charges, and speaking only of the indeterminate terms. The court did not sentence defendant to an indeterminate term in case No. SA091839. As defendant has failed to show that the trial court misunderstood its discretion, we reject his ineffective assistance claim.

VI. Eighth Amendment

Defendant contends that his sentence was cruel or unusual, in violation of the Eighth Amendment to the United States Constitution. Defendant, who was 22 years old at the time of committing the offenses, relies on language in *Miller v. Alabama* (2012) 567 U.S. 460, *Graham v. Florida* (2010) 560 U.S. 48, *People v. Franklin* (2016) 63 Cal.4th 261, and *People v. Caballero*

(2012) 55 Cal.4th 262, to argue that he should be treated as a juvenile offender. Without citation to any case authority which treats a young adult as a juvenile in sentencing, defendant relies on section 3051, which provides an opportunity for parole after 15 or 25 years for persons who were under the age of 25 (23 at the time of defendant's sentencing) at the time they committed their crimes. From this he reasons that "California's Eighth Amendment jurisprudence recognizes that a defendant's youthful status -- up to the age of 23 -- and its attendant characteristics, is the primary factor to be considered in sentencing a youthful offender." Defendant is mistaken. Nearly identical arguments have been rejected by the courts of appeal. (See *People v. Perez* (2016) 3 Cal.App.5th 612, 616-620; *People v. Abundio* (2013) 221 Cal.App.4th 1211, 1220-1221; *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482.) We agree with those cases, adopt their reasoning here, and reject defendant's claim.

VII. Senate Bill No. 1393

Defendant asks that the sentence be vacated and the matter remanded for resentencing in light of Senate Bill No. 1393, which amended sections 667, subdivision (a)(1) and 1385, subdivision (b), effective January 1, 2019, to give trial courts the discretion to strike sentencing enhancements for prior serious felony convictions in the interest of justice. (Stats. 2018, ch. 1013, §§ 1 & 2.) Respondent agrees that the statute applies to defendant under the rule of *In re Estrada* (1965) 63 Cal.2d 740, 744-745, and that remand is appropriate. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) However, there is no need to vacate the sentence as defendant asks. We simply remand to allow the trial court to exercise its discretion to strike or not to strike the enhancements imposed under section 667, subdivision (a)(1).

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for the trial court to exercise its discretion whether or not to strike the enhancements imposed under section 667, subdivision (a)(1). If the court elects to exercise this discretion, the defendant shall be resentenced and an amended abstract of judgment prepared and forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT